No. 5725.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park, and C. H. Merrill,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF ISSUES.

Appellant's first and second points of argument are that:

1. The county of Los Angeles was excluded from furnishing and supplying water to the inhabitants of the Fruitland District.

2. The county of Los Angeles had no authority at the time of the granting of appellant's franchise to erect works for supplying its inhabitants water for domestic and irrigation purposes.

3. Appellant's third point in effect is that because of the absence of the power of the county to furnish and supply water to the inhabitants of Fruitland District and because of the absence of the power of the county to erect works for supplying water to the inhabitants of the county, Ordinance No. 72 in effect granted an exclusive franchise to the appellant, and barred the county, the city of Huntington Park, and every other city or individual from undertaking to supply water to such inhabitants.

4. Appellant's fourth point is that the laying of water mains in the Fruitland District and the furnishing of water to the inhabitants thereof by the city of Huntington Park would impair the obligation of appellant's franchise contract.

5. Appellant's fifth point is that the equities in this case are all in favor of appellant.

ARGUMENT.

I.

The Granting of a Franchise to Appellant Did Not Place a Limitation Upon the Operation of the General Laws of the State, Nor Upon the Powers of the Municipalities Organized Under Those Laws.

At the time of the granting of plaintiff's franchise the Municipal Corporation Act of 1883 was in full force and effect. Under the amendment of section 862, subdivision 3 of this act, which amendment was enacted in 1885, the board of trustees of cities of the sixth class had power:

> "Third—To contract for supplying the city or town with water for municipal purposes, or to acquire, construct, repair and manage pumps, aqueducts, reservoirs, or other works, necessary or proper for supplying water for the use of such city or its inhabitants, or for irrigating purposes therein."
>
> Statutes 1883, p. 94;
>
> Statutes 1885, p. 127.

The foregoing provision was in effect on April 13, 1903. Also cities of the sixth class had at that time a right to incur indebtedness for carrying out the purposes of subdivision 3 of said section 862.

California Statutes, 1901, page 27, section 1, and part of section 2 provide as follows:

> "Section 1. Any city, town or municipal corporation incorporated under the laws of this state, may as hereinafter provided incur indebtedness to pay the cost of any municipal improvement requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy.

"Section 2. Whenever the legislative branch of any city, town or municipal corporation shall, by resolution passed by vote of two-thirds of all its members and approved by the executive of said municipality, determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement, including bridges, water works, water rights, sewers, light or power works or plants, buildings for municipal uses, school houses, fire apparatus, and street work, or other works, property or structures necessary or convenient to carry out the objects, purposes and powers of the municipality, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may at any subsequent meeting of such board, by a vote of two-thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters of said city, town or municipal corporation the proposition of incurring a debt for the purpose set forth in said resolution."

This act is one under which California municipalities have for many years, and do today, bond themselves for the construction of water works.

Likewise, at the time of the grant of plaintiff's franchise the General Laws of California provided for the annexation of uninhabited territories to municipalities (Statutes 1899, p. 39) and of inhabited territories to municipalities. (Statutes 1889, p. 358.) Both of these laws, with some slight amendments, are in effect today.

At the time the Board of Supervisors granted plaintiff's franchise it was contemplated by law that any portion of the county might at any time be annexed to any adjacent

municipality, in a manner provided by law, and that all municipalities of the sixth class might acquire, construct and operate works for the supplying of water to their inhabitants, or for irrigating purposes within their corporate boundaries.

The Board of Supervisors could not render inoperative the provision of the General Laws and the powers and privileges of municipalities organized thereunder.

Adopting and reiterating the following decisions contained on page 28 of appellant's brief, we submit that the appellant took its franchise subject to the foregoing General Laws of California and that the provisions of those laws were read into and became a part of appellant's franchise:

> "and the settled law of the land at the time a contract is made becomes a part of it and must be read into it."
>
> Weinrich Co. v. Johnston Co., 28 Cal. App. 144.

> "All applicable laws in existence when an agreement is made necessarily enter into it and form *a part of it as fully as if they were expressly referred to and incorporated in its terms.*"
>
> Marshall v. Wentz, 28 Cal. App. 540.

> "As this court often has held, the laws in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated in its terms."
>
> Northern Pacific Railway Co. v. Wall, 241 U. S. 87, 60 L. Ed. 905, at 907.

II.

The Lack of Power of the Supervisors or County to Erect Works for and Engage in the Supplying of Water Does Not Make Grant to Licensee Exclusive Unless so Expressed.

A limitation upon the power of an officer or legislative or governing body granting a franchise does not enlarge the powers of that officer or body or enlarge the privileges granted under such franchise beyond those expressly set forth therein. This was determined by the Supreme Court of California as early as 1862, in Fall v. County of Sutter, *et al.*, 21 Cal. 237.

In 1850 the Legislature of California passed an act concerning public ferries by which the courts of sessions of the several counties were authorized, upon proper application, to establish ferries and to license the applicants to receive tolls fixed in amount by the court upon complying with the provisions of the act. Under this act the plaintiffs, in 1852, obtained the license to build a bridge across the Feather River near the city of Marysville and to take tolls thereon for the period of 20 years. The bridge was constructed and the plaintiffs complied with the provisions of the law in all respects as to its maintenance. In 1855 another act was passed giving the authority to establish toll-bridges and ferries to supervisors of the several counties and regulating the mode in which licenses should be given and renewed and the tolls fixed and prescribing the duties of the licensees. Under the color of an act of the Legislature passed April 11, 1859, there was granted to the county of Sutter the right and privilege of constructing and keeping across

Feather River a bridge for public use, the cost of the bridge to be paid in the manner in said bill provided, and when so paid the bridge was to be free for all crossings for persons or property.

The judge of the county court of Sutter having denied plaintiffs' bill for injunction, appeal was taken to the Supreme Court, and the Supreme Court, in affirming the decision of the lower court, among other things said:

> "We do not consider it necessary to criticise very closely the provisions of the Act of 1850 or 1855 in reference to bridges, ferries, etc., to determine whether the rights of the plaintiffs are governed by the first or last of these statutes, or both together; nor is it necessary to decide the question of the power of the Legislature to divest itself, by way of grant, of the right to make any further or other grant of a ferry or bridge franchise, so as to interfere with the business or profits of the one first granted. For it is not pretended that any express grant was made to the plaintiffs here to this effect. The Acts of 1850 and 1855, while they empower the court of sessions in one case, and the board of supervisors in the other, to grant this franchise, do not purport to make the grant in exclusion of the right of the state, or the board, or the court, to grant to anyone else a franchise for a bridge or ferry in the same neighborhood, or so situated as to interfere with the first. These franchises, being sovereign prerogatives, belong to the political power of the state, and are primarily represented and granted by the Legislature as the head of the political power; and the subordinate bodies or tribunals making the grants are only agents of the Legislature in this respect. But the delegation of these powers to these subordinates in no way impairs the power of the Legislature to make the grant. The

effect of the grant is unquestionably to give a right of property to the grantee or licensee; and it would not be in the power of the Legislature to divest this property or transfer it to another person, so long as the owner held in obedience to the law. No attempt is made to divest *this property,* or to destroy or impair *this franchise.* What the appellants contend for is, that not only have they this property and this franchise, but they have also the right to insist that no other franchise of like kind shall be granted, the effect of which would be to *impair the value and take away the profits* of their own; in other words, that their grant is of the exclusive right to the profits of the travel in the neighborhood—at least within the distance of this bridge to their own. We think the rule is settled to the contrary at this day. Ever since the great case of the *Charles River Bridge Company v. Warren Bridge Company* (11 Pet. 548), these grants have been held not exclusive—as granting a right, but not as estopping the granting power from making other grants, though the effect of the last be to destroy the profits of the first.

"(See, also, *Hartford v. East Hartford,* 11 Pet. 534; *Bank of Ohio v. Knapp,* 16 How. 369; *Bush v. Peru Bridge Co.,* 3 Ind. 21; *Indian Canon Road v. Robinson,* 13 Cal. 510.)

"The question is very fully considered in the cases of the Supreme Court of the United States and in the case of 3 Indiana. The reasoning upon which the conclusion negativing the claim of the grantee goes is, that the grant is not *in terms* a grant of an exclusive right; and that the government holding this power, to be exercised for the public interest and convenience, is not to be presumed to part with it; but the intent to do so must affirmatively appear, and be plain and manifest, and that this intent is not

shown from a mere grant of the franchise and privilege, this grant being effectual to show that the Legislature had given the particular right to one grantee, but not proving that the Legislature had divested itself of the power to grant in the same vicinity to any other."

Fall v. County of Sutter, 21 Cal. 237, 250-253.

In the foregoing case the Court of Sessions did not have the power to itself construct and operate toll-bridges, but the absence of this power did not vest in the plaintiffs any greater rights or more exclusive privileges than they would have had if the Court of Sessions had been vested with the right to construct and operate toll-bridges; or, stating the proposition from another angle, the absence of this power in the Court of Sessions did not convey to the licensees any rights, powers or privileges not expressly contained in his franchise, and did not convert a mere general franchise into an exclusive one.

Likewise, in this present case, if the Board of Supervisors on April 13, 1903, did not have the power to itself erect works for and engage in the supplying of water, that fact would not vest in appellant any greater or more exclusive privilege than would have been vested if the Board of Supervisors had possessed full power to erect works and engage in the supplying of water. The lack of such power in the Board of Supervisors did not convert a mere general franchise into an exclusive one.

The United States Supreme Court has held to the same effect in Wright v. Nagle, 101 U. S. 791 (25 Law Ed. 921). Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"This was a suit in equity, brought by Wright and Shorter in the Superior Court of Floyd county, Georgia, to restrain the defendants from continuing and maintaining a toll-bridge across the Etowah River, at Rome, in that county. The facts are these: In July, 1851, the inferior court of Floyd county entered into a contract with one H. V. M. Miller, by which the court, for a good and valuable consideration, granted to Miller and his heirs and assigns forever, so far as it had authority for that purpose, the exclusive right of opening ferries and building bridges across the Oostanaula and Etowah rivers, at Rome, within certain specified limits. Miller, on his part, bound himself by certain covenants and agreements appropriate to such a contract. He afterwards assigned his rights under the contract, so that when this suit was commenced the complainants, Wright and Shorter, were the owners. Large amounts of money were expended in building and maintaining the required bridges, and the franchise is a valuable one. In December, 1872, the commissioners of roads and revenue for the county authorized the defendants to erect and maintain a toll-bridge across the Etowah, within the limits of the original grant to Miller. The bill avers that 'The said board of commissioners in the making and conferring of said franchise exercised legislative powers conferred upon it by the laws of the state; that the said grant is in the nature of a statute of the Legislature; that the same is an infringement of the said grant and contract made by the said superior (inferior) court to and with the said H. V. M. Miller, under whom complainants hold, and impairs the obligation and validity thereof, and is repugnant to the Constitution of the United States, art 1, sec. 10, par. 1, which prohibits a state from passing any law impairing the obligation of

> contracts; and the complainants pray that the said grant to said defendants be by this court annulled and declared void, and the defendants perpetually enjoined from any exercise of the privileges thereby conveyed and granted. * * *' Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from a legislature its power will always be construed most strongly in favor of the state. These are elementary principles. The question here is, whether the Legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the state to establish such ferries and bridges in a particular locality as the ever changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to establish ferries or bridges, but not to tie the hands of the public in respect to its future necessities. The right to establish one bridge and fix its rates of toll does not imply a power to bind the state or its instrumentalities not to establish another in case of necessity."

In the case now before the court the right of the Board of Supervisors to grant a franchise did not "tie the hands of the public in respect to its future necessities." It "does not imply a power to bind the state or its instrumentalities not to establish" waterworks "in case of necessity."

The case of United Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519, follows the ruling laid down in the Knoxville Water Company case and in the Madera Waterworks case. In the United Railroads case of San Francisco, plaintiff had a franchise to maintain two tracks on Market street in the city of

San Francisco. The city of San Francisco was about to construct a municipal street railroad on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double tracks for more than five blocks, and to effect a certain crossing over plaintiff's tracks. Plaintiff sought to restrain the city from the construction of its tracks. The franchise of the plaintiff to maintain its two tracks on Market street was granted to its predecessor in title in September, 1879. At that time, by section 499 of the Civil Code of California,

> "two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

Section 5 of the order of the board of supervisors granting the franchise to plaintiff's predecessor provides as follows:

> "It shall be lawful for the board of supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this state. This section shall apply to persons and companies, as well as corporations."

Mr. Justice Holmes, in delivering the opinion of the court, upon the construction of said sections 499 and 5, said:

> "We agree with the district court that these sections did not give to the plaintiff the right it claims.

> "The section of the code would seem to be a limitation of the powers conferred upon the board of supervisors by that and the adjoining sections, not a contract by the state, or an authority to the board to contract, against a larger use of the streets. It most naturally is read as merely a general law declaring the present legislative policy of the state."

In the case at bar, "a limitation of the powers conferred upon the Board of Supervisors" would not constitute "a contract by the state, or an authority to the board to contract against a larger use of the streets" of the city of Huntington Park.

III.

Appellant Acquired by His Franchise Only Such Rights as Were Granted in Clear and Specific Terms. Nothing Was Granted by Implication.

Section 1069 of the Civil Code of California, enacted March 21, 1872, provides that:

> "*Interpretation against grantor.* A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor."

In 1891, in Coosaw Mining Company v. State of South Carolina, 144 U. S., p. 562, Mr. Justice Harlan laid down the principle which we believe controls in this case. Mr. Justice Harlan said:

> "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest.

> * * * Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. * * * This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' "

The case of Knoxville Water Co. v. City of Knoxville, 200 U. S. 22, 25, decided in 1905 (cited and quoted from by appellant), crystalized former decisions and firmly established the rule which has been since followed by the United States courts, as well as by the courts of California.

The facts in that case, briefly stated, are:

Prior to 1882, the city of Knoxville determined to establish a system of waterworks and to that end purchased certain real estate. The scheme was then abandoned. On July 1, 1882, the city entered into an agreement with the plaintiff by which the plaintiff was to erect and establish, on the land acquired by the city, a system of waterworks, for the purpose of furnishing water to the city and its inhabitants. The city covenanted and agreed, among other things,

> "not to grant to any other person or corporation, any contract or privileges to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, A. D. 1883, pro-

vided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement."

It was further agreed that at the expiration of fifteen years from the time fixed for the completion of the waterworks, or, in certain event, at the expiration of each and every year thereafter, the city would have the option to purchase the waterworks from the plaintiff. On February 2nd, 1903, the Legislature of Tennessee passed an act enabling the city of Knoxville to exercise its said option to purchase. To that end the city authorized the issuance of bonds. Thereafter, on April 3rd, 1903, the Legislature amended its Act of February 2, 1903, and authorized city of Knoxville to acquire, own and operate a system of waterworks, either by purchase or construction, and for such purpose to issue interest-bearing bonds in an amount not exceeding $750,000.00. Accordingly, on July 2nd, 1903, an election was held and bonds voted. On or about May 20, 1904, the city council of Knoxville conceived and was about to enter upon a plan of establishing a system of waterworks wholly independent of and in competition with that maintained by the plaintiff. Suit was thereupon brought upon the theory that the legislative enactments of 1903 were laws impairing the obligation of the contract of 1882 and upon the further theory that the maintenance by the city of a system of waterworks in competition with those of the plaintiff would inevitably destroy the value of the latter's property and would be a taking of the company's property for public use without compensation, in violation of the due process of law enjoined by the 14th amendment. A perpetual injunction was asked.

Mr. Justice Harlan stated the question involved as follows:

> "The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it cannot, consistently with the constitutional rights of the water company, establish and maintain, a separate system of waterworks of its own. If the city made no such contract, that will be an end of the case."

Justice Harlan, in delivering the opinion of the court, among other things, said:

> "While there is no case precisely like the present one in all its facts, the adjudged cases lead to no other conclusion than the one just indicated. We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which, under previous authority, had placed its pipes, mains, etc., in public streets to supply, and was supplying, gas for a city and its inhabitants: 'It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works, for the purpose for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis v. Whitney*, 13 Wall. 68, 70, 20 L. Ed. 513, 514: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies

to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public.' *Hamilton Gaslight & Coke Co. v. Hamilton,* 146 U. S. 258, 268, 36 L. Ed. 963, 968, 13 Sup. Ct. Rep. 90; *Skaneateles Waterworks Co. v. Skaneateles,* 184 U. S. 354, 363, 46 L. Ed. 585, 590, 22 Sup. Ct. Rep. 400.

"So in *Joplin v. Southwest Missouri Light Co.,* 191 U. S. 150, 156, 48 L. Ed. 127, 129, 24 Sup. Ct. Rep. 43, which involved the question whether a city could establish its own electric plant in competition with that of a private corporation, the court said: 'The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government.'

"Again, in the recent case of *Helena Waterworks Co. v. Helena,* 195 U. S. 383, 392, 49 L. Ed. 245, 250, 25 Sup. Ct. Rep. 40, where a city established its own system of waterworks in competition with that of a private company, the court, observing that the city had not specifically bound itself not to construct its own plant, said: 'Had it been intended

to exclude the city from exercising the privilege of establishing its own plant, such purpose should have been expressed by apt words, as was the case in *Walla Walla v. Walla Walla Water Co.*, 172 Cal. U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable; but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract.' To the same effect, as to the principle involved, are *Washington & C. Turnp. Co. v. Maryland,* 3 Wall. 210, 213, 18 L. Ed. 180, 182; *Stein v. Bienville Water Supply Co.,* 141 U. S. 67, 81, 35 L. Ed. 622, 628, 11 Sup. Ct. Rep. 892; *Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718.

"It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers.

"As, then, the city of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case. The judgment of that court dismissing the bill must be affirmed."

To the same effect see Madera Waterworks v. City of Madera, 228 U. S. 454-457, decided in 1913; also United

Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519, decided in 1919.

The Supreme Court of California has followed the rule laid down in Knoxville Water Co. v. City of Knoxville, 200 U. S. 22.

In Clark v. City of Los Angeles, 160 Cal. 30, 39, Justice Shaw said:

> "It is a general principle of construction, too well established to require discussion, that grants of franchises and special privileges by the state to private persons or corporations are to be construed most strongly in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. (*Charles River B. Co. v. Warren B. Co.,* 11 Pet. (U. S.) 543 (9 L. Ed. 773); *Helena W. Co. v. Helena,* 195 U. S. 392 (25 Sup. Ct. 40, 49 L. Ed. 245); *Knoxville W. Co. v. Knoxville,* 200 U. S. 33 (26 Sup. Ct. 224, 50 L. Ed. 353); *Mayrhofer v. Board,* 89 Cal. 112 (23 Am. St. Rep. 451, 26 Pac. 646); *Skelly v. School Dist.,* 103 Cal. 655 (37 Pac. 643); *Witter v. School Dist.,* 121 Cal. 350 (66 Am. St. Rep. 33, 53 Pac. 905).)"

In Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265, 273, Justice Angellotti, in delivering the opinion of the court, among other things said:

> "It is a well settled principle that grants contained in public statutes or made by public officers or public bodies are to be strictly construed in favor of the public, the rule being clearly stated in *Knoxville Water Co. v. Knoxville,* 200 U. S. 22, 33 (50 L. Ed. 353, 26 Sup. Ct. 224), as follows: 'Only that which is granted in clear and explicit terms passes by a

grant of property, franchises, or privileges in which the government has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.' This rule of construction of public grants has been incorporated in our Civil Code, section 1069 of the Civil Code providing: 'A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, *and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.*' The italics are, of course, ours. (See opinion of Chief Justice Beatty in *Oakland v. Oakland Water Front Co.,* 118 Cal. 174 and 175 (50 Pac. 277), and *Clark v. City of Los Angeles,* 160 Cal. 30 (116 Pac. 722)."

In the Matter of Russell, 163 Cal. 668, 678, Justice Shaw again held as follows:

"It is an established principle of construction, applicable to constitutions as well as to statutes, that grants thereby made to private persons or public service corporations of rights belonging to the state or to the public 'are to be construed most strongly in favor of the public.' (*Clark v. Los Angeles,* 160 Cal. 39 (116 Pac. 725); *Sunset etc. Co. v. Pasadena,* 161 Cal. 273 (118 Pac. 799).) 'Only that which is granted in clear and explicit terms passes' by such grant. 'Nothing passes by implication.' (*Knoxville Water Co. v. Knoxville,* 200 U. S. 33 (50 L. Ed. 353, 26 Sup. Ct. Rep. 224).)"

In Rogers Park Water Co. v. City of Chicago, *et al.,* 131 Ill. App. 35, 37, 52, the court held that a franchise, exclusive by its terms, did not bar the annexing municipality from exercising those rights which, by franchise,

had been previously granted to a private corporation by the village annexed.

The court in that case followed the rule early established by the United States Supreme Court and in its opinion stated that:

> "Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public. Turnpike Co. v. Illinois, 96 U. S. 63.
>
> "The universal rule in doubtful cases is that the construction shall be against the grantee and in favor of the government. Oregon Railway Co. v. Oregonian Ry. Co., 130 U. S. 1.
>
> "The doctrine is firmly established that only that which is granted in clear and special terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication. Coosaw Mining Co. v. South Carolina, 144 U. S. 550."

From the foregoing cases it will be observed that the appellant, by Ordinance No. 72 of Los Angeles county, California, was granted only such rights and privileges as were expressly set forth in said ordinance or franchise. No single word appears which implies, suggests or intimates that there was even a suspicion of an intent on the part of the licensor to grant or on the part of the licensee to receive any exclusive privileges. There is no ambiguity in the terms of the ordinance or franchise, and surely the appellant will not now be permitted to read

into his franchise an intent or an ambiguity of which there is no evidence.

We respectfully direct the court's attention to the fact that in the case of Walla Walla v. Walla Walla Water Works, 172 U. S. 1, cited and quoted from by appellant, was a case where the city of Walla Walla, by express words in its contract, had barred itself from doing the thing for which it had granted a franchise.

Likewise, we wish to direct the court's attention to the fact that the case of City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, was a case where the City of Vicksburg had, by express terms, granted an exclusive franchise to the licensee, the terms of exclusion being so plain that there could be no doubt as to the intent of the franchise.

IV.

Annexation of the Fruitland District to City of Huntington Park Did Not Diminish or Add to the Rights of Appellant.

Without argument we will concede that when the Fruitland District was annexed to the city of Huntington Park the rights of the owner of the franchise granted by said Ordinance 72 were in no wise altered. The rights and privileges of the owner of that franchise were neither diminished nor added to.

V.

The Laying of Water Mains in the Fruitland District and the Furnishing of the Water to the Inhabitants Thereof by the City of Huntington Park Would Not Impair the Obligation of Appellant's Contract.

At the risk of repetition, we again quote a part of the opinion of Mr. Justice Harlan in Knoxville Water Co. v. City of Knoxville, 200 U. S. 22-25:

> "We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which, under previous authority, had placed its pipes, mains, etc., in public streets to supply, and was supplying, gas for a city and its inhabitants: 'It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works, for the purpose for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis v. Whitney,* 13 Wall. 68, 70, 20 L. Ed. 513, 514: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and ex-

plicit language as will take their contracts out of the established rule that public grants susceptible of two constructions, must receive the one most favorable to the public.' "

In Madera Waterworks v. City of Madera, 228 U. S. 454-457 (also cited and quoted from by appellant in its brief), follows the rule laid down in Knoxville Water Company v. City of Knoxville. The facts in that case are stated by the court as follows:

> "The ground of the suit is that the state constitution provides that in any city where there are no public works owned by the municipality for supplying the same with water, any individual or corporation of the state shall have the privilege of using the public streets and laying down pipes, etc., for the purpose, subject to the right of the municipal government to regulate the charges. Art. 11, Sec. 19. It is argued that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the corresponding duty of the water company to comply with the regulations, both under severe penalties (Art. 14, Secs. 1, 2, Act of March 7, 1881, Secs. 1, 7, 8), imports a contract that the private person or corporation constructing works as invited shall not be subject to competition from the public source. Otherwise, it is pointed out, the same body will be called upon to regulate the plaintiff's charges and to endeavor to make a success of the city works. Furthermore, the plaintiff is forbidden by other provisions to divert its property to other uses, and, again, will be called on to pay taxes to help its rival to succeed. Thus, it is said, the city proposes to destroy the plaintiff's property, contrary to the 14th Amendment of the Constitution of the United States."

Mr. Justice Holmes, delivering the opinion of the court, stated:

"But if, when the plaintiff built, the Constitution of the state authorized cities to build waterworks as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen. An appeal to the 14th Amendment to protect property from a congenital defect must be vain. Abilene Nat. Bank v. Dolley, 228 U. S. 1, 5, *ante,* 707, 33 Sup. Ct. Rep. 409. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the Constitution so as to avoid the result, if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class forbid us to resort to the fiction that a promise is implied.

"The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90; Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 156, 48 L. Ed. 127, 129, 24 Sup. Ct. Rep. 43; Helena Waterworks Co. v. Helena, 195 U. S. 383, 388, 392, 49 L. Ed. 245, 248, 250, 25 Sup. Ct. Rep. 40. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 35, 50 L. Ed. 353, 359, 26 Sup. Ct. Rep. 224. Compare Vicksburg v. Vicksburg Waterworks Co., 202 U. S.

> 453, 470, 50 L. Ed. 1102, 1111, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253. As there is no contract, the plaintiff stands legally in the same position as if the Constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show."

The case of United Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519 (*supra*), follows the ruling laid down in the Knoxville Water Company case and in the Madera Waterworks case. It will be remembered that in the United Railroads case of San Francisco, plaintiff had a franchise to maintain two tracks on Market street in the city of San Francisco; that the city of San Francisco was about to construct a municipal street railroad on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double tracks for more than five blocks and to effect a certain crossing over plaintiff's tracks; and that plaintiff sought to restrain the city from the construction of its tracks, claiming that plaintiff had an exclusive franchise, that the threatened construction by the city of San Francisco would be in violation of plaintiff's franchise contract rights and that the city's remedy was by eminent domain.

Mr. Justice Holmes, in delivering the opinion of the court, among other things said:

> "The plaintiff took the risk of the judicial interpretation of its franchise and of this possible event. Madera Waterworks v. Madera, 228 U. S. 454, 57 L. Ed. 915, 33 Sup. Ct. Rep. 571. Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort to eminent domain."

When the appellant's predecessor in interest obtained its franchise from the county of Los Angeles it knew, or was presumed to have known, that cities of the sixth class might be organized under general laws then existing; that such cities might annex territory under laws likewise then existing; and that also, under laws then existing, such cities might acquire, construct and manage works necessary or proper for supplying water for the use of such cities and their inhabitants and knowing this, or having been presumed to know it, the said franchise was acquired with the full knowledge, actual or presumed, and upon the condition that any sixth class municipality, then or thereafter organized and acquiring jurisdiction over the Fruitland District, whether by original incorporation or annexation, might acquire, construct and manage waterworks in competition with the licensee, and that in so doing such city would not be destroying the property rights of licensee contrary to the 14th Amendment of the Constitution of the United States and would not be impairing any obligation between the county of Los Angeles and the licensee in contravention of section 10 of article I of the Constitution of the United States.

VI.

The Equities in This Case Are Not in Favor of Appellant.

We respectfully assert that Knoxville Water Co. v. City of Knoxville, 200 U. S. 22-25; Madera Waterworks v. City of Madera, 228 U. S. 454-457, and United Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519, were bills in equity decided by the Supreme Court of the United States. We further submit

that Clark v. City of Los Angeles, 160 Cal. 30, 39, and Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265-273, were both suits in equity decided by the Supreme Court of the state of California. In each of the foregoing cases the court determined the equities in accordance with the rule that

> "if parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants susceptible of two constructions must receive the one most favorable to the public."
>
> Knoxville Water Co. v. City of Knoxville, 200 U. S. 20-25.

In this present case there is nothing in the franchise of appellant susceptible of two constructions. By the language of this franchise there can be but one construction and even equity cannot be made so elastic as to read into the franchise words never intended to be incorporated by either the licensor or licensee.

For the foregoing reasons we submit that the decree of the District Court, dismissing appellant's bill of complaint, should be affirmed.

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